

1  
2  
3  
4  
5  
6  
7 UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
89 JESS DESHAZO, )  
10 Plaintiff, ) No. CV-05-0404-CI  
11 v. )  
12 JO ANNE B. BARNHART, ) ORDER DENYING PLAINTIFF'S  
13 Commissioner of Social ) MOTION FOR SUMMARY  
Security, ) JUDGMENT  
14 Defendant. )  
1516 BEFORE THE COURT are cross-Motions for Summary Judgment (Ct.  
17 Rec. 11, 13), noted for hearing without oral argument on June 26,  
18 2006. Attorney Lora Lee Stover represents Plaintiff; Assistant  
19 United States Attorney Pamela J. DeRusha and Special Assistant  
20 United States Attorney Nancy A. Mishalanie represent Defendant. The  
21 parties have consented to proceed before a magistrate judge. (Ct.  
22 Rec. 5.) After reviewing the administrative record and the briefs  
23 filed by the parties, the court **DENIES** Plaintiff's Motion for  
24 Summary Judgment (Ct. Rec. 11) and **GRANTS** Defendant's Motion for  
25 Summary Judgment (Ct. Rec. 13).26 **JURISDICTION**  
27  
28 On November 5, 2001, Jess Deshazo (Plaintiff) protectively  
filed applications for disability insurance benefits and

1 supplemental security income benefits, alleging an onset date of  
 2 November 15, 2001. (Tr. 71-73.) The claim was denied initially and  
 3 on reconsideration; a request for hearing was ultimately filed.  
 4 Administrative Law Judge (ALJ) Richard Hines denied benefits on  
 5 December 17, 2004; the Appeals Council denied Plaintiff's request  
 6 for review. The instant matter is before this court pursuant to 42  
 7 U.S.C. § 405(g).

8 **STANDARD OF REVIEW**

9 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
 10 court set out the standard of review:

11 A district court's order upholding the Commissioner's  
 12 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
 13 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
 14 Commissioner may be reversed only if it is not supported  
 15 by substantial evidence or if it is based on legal error.  
*Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
 16 Substantial evidence is defined as being more than a mere  
 17 scintilla, but less than a preponderance. *Id.* at 1098.  
 18 Put another way, substantial evidence is such relevant  
 19 evidence as a reasonable mind might accept as adequate to  
 20 support a conclusion. *Richardson v. Perales*, 402 U.S.  
 21 389, 401 (1971). If the evidence is susceptible to more  
 22 than one rational interpretation, the court may not  
 23 substitute its judgment for that of the Commissioner.  
*Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of  
 Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

24 The ALJ is responsible for determining credibility,  
 25 resolving conflicts in medical testimony, and resolving  
 26 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
 27 Cir. 1995). The ALJ's determinations of law are reviewed  
 28 *de novo*, although deference is owed to a reasonable  
 construction of the applicable statutes. *McNatt v. Apfel*,  
 201 F.3d 1084, 1087 (9th Cir. 2000).

24 **SEQUENTIAL PROCESS**

25 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
 26 requirements necessary to establish disability:

27 Under the Social Security Act, individuals who are  
 28 "under a disability" are eligible to receive benefits. 42  
 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
 medically determinable physical or mental impairment"

1 which prevents one from engaging "in any substantial  
 2 gainful activity" and is expected to result in death or  
 3 last "for a continuous period of not less than 12 months."  
 4 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
 5 from "anatomical, physiological, or psychological  
 6 abnormalities which are demonstrable by medically  
 7 acceptable clinical and laboratory diagnostic techniques."  
 8 42 U.S.C. § 423(d)(3). The Act also provides that a  
 9 claimant will be eligible for benefits only if his  
 10 impairments "are of such severity that he is not only  
 11 unable to do his previous work but cannot, considering his  
 12 age, education and work experience, engage in any other  
 13 kind of substantial gainful work which exists in the  
 14 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
 15 the definition of disability consists of both medical and  
 vocational components.

10 In evaluating whether a claimant suffers from a  
 11 disability, an ALJ must apply a five-step sequential  
 12 inquiry addressing both components of the definition,  
 13 until a question is answered affirmatively or negatively  
 14 in such a way that an ultimate determination can be made.  
 15 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
 16 claimant bears the burden of proving that [s]he is  
 17 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
 18 1999). This requires the presentation of "complete and  
 19 detailed objective medical reports of h[is] condition from  
 20 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
 21 404.1512(a)-(b), 404.1513(d)).

#### 16 STATEMENT OF THE CASE

17 The facts have been presented in the administrative transcript,  
 18 and the ALJ's decision, and will be summarized briefly here. At the  
 19 time of the hearing, Plaintiff was 27 years old, with a high-school  
 20 education and about two years at community college. (Tr. 534, 544.)  
 21 His past work experience included jobs as a janitor, food server,  
 22 cashier, roofer, sales representative, projectionist, clothing  
 23 inspector and child care worker.<sup>1</sup> (Tr. 83, 547, 548.)

24 In 1997, Plaintiff began taking male hormones after several  
 25 years of gender identification therapy. He continued the hormone

---

26 <sup>1</sup> Plaintiff is a transgender female who prefers to be  
 27 identified as a male. (Tr. 243, 548.) As such, the court refers to  
 28 Plaintiff herein in the male gender.

1 therapy for about one and one half years, but did not proceed to  
2 sexual configuration. He testified he had always had difficulty  
3 with gender issues and felt he was discriminated in the work place  
4 due to his presentation as a male. (Tr. 533.) He testified he  
5 could not work because of depression, anxiety and an inability to  
6 work with the public. (Tr. 523.) In addition to mental health  
7 issues, Plaintiff complained of a variety of physical ailments,  
8 although none had required surgery or hospitalization since 2000.  
9 (Tr. 522.) Plaintiff has a history of intermittent substance abuse  
10 and reported heavy methamphetamine use between 1997 and 2003, as  
11 well as cocaine and marijuana use. (Tr. 356.) At the time of the  
12 hearing, he testified he had not used illegal drugs for over one  
13 year. (Tr. 531.) He attended at least two chemical dependency  
14 outpatient programs. (Tr. 356.) Plaintiff's last job was as a film  
15 projectionist in 2000. He quit due to family problems and conflict  
16 with his supervisor. (Tr. 356, 521.) Based on the ALJ's  
17 hypothetical question, vocational expert Thomas Moreland testified  
18 that Plaintiff was capable of performing his past work as a cleaner  
19 and a projectionist. (Tr. 549.)

20 **ADMINISTRATIVE DECISION**

21 The ALJ determined Plaintiff had not engaged in substantial  
22 gainful activity since the alleged onset of his disability. (Tr.  
23 30.) At step two and three, ALJ Hines concluded Plaintiff had  
24 severe mental impairments which limited his ability to work but,  
25 alone or in combination, did not meet or equal the listings. (Tr.  
26 27.) He also found Plaintiff had non-severe impairments of  
27 intermittent asthma and treatable bilateral *pes planus*. Medical  
28 records mentioned hepatitis C and carpal tunnel syndrome, but the

1 ALJ found there was no evidence that these conditions limited  
2 Plaintiff's ability to work. (Id.) The ALJ found Plaintiff's  
3 complaints of functional limitations were not fully credible. (Tr.  
4 28.)

5 Regarding Plaintiff's residual functional capacity (RFC), the  
6 ALJ determined Plaintiff was capable of performing a full range of  
7 exertion in work with limited to superficial contact with the public  
8 and superficial interaction with co-workers. (Tr. 30.) Based in  
9 part on testimony by vocational expert Moreland, the ALJ determined  
10 Plaintiff was capable of performing his past relevant work as a  
11 projectionist and industrial cleaner (light and medium work). (Tr.  
12 549-50.) Plaintiff was found not disabled. (Id.)

#### 13 **ISSUES**

14 The question presented is whether there is substantial evidence  
15 to support the ALJ's decision to deny benefits and, if so, whether  
16 the decision was based on proper legal standards. Plaintiff asserts  
17 the ALJ erred when he (1) found Plaintiff had no severe physical  
18 impairments; (2) found Plaintiff not credible; and (3) improperly  
19 assessed Plaintiff's RFC.

#### 20 **ANALYSIS**

21 At step two of the sequential process, the ALJ must conclude  
22 whether Plaintiff suffers from a "severe" impairment, one which has  
23 more than a slight effect on the claimant's ability to work. The  
24 effects of all symptoms must be evaluated on the basis of a  
25 medically determinable impairment that can be shown to be the cause  
26 of the symptoms. 20 C.F.R. §§ 404.1529(b), 416.929(b). Once  
27 medical evidence of an underlying impairment has been shown, medical  
28 findings are not required to support the alleged severity of pain.

1 *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).

2 Social Security Regulations (Regulations) provide that an  
 3 impairment is "severe" if it significantly limits one's ability to  
 4 perform basic work activities. 20 C.F.R. §§ 404.1520(c),  
 5 416.920(c). An impairment is considered non-severe if it "does not  
 6 significantly limit your physical or mental ability to do basic work  
 7 activities." 20 C.F.R. §§ 404.1521, 416.921. However, an overly  
 8 stringent application of the severity requirement violates the  
 9 statute by denying benefits to claimants who do meet the statutory  
 10 definition of disabled. *Corrao v. Shalala*, 20 F.3d 943, 949 (9th  
 11 Cir. 1994). Thus, the Commissioner has passed regulations which  
 12 guide dismissal of claims at step two. Those regulations state an  
 13 impairment may be found to be not severe *only* when evidence  
 14 establishes a "slight abnormality" on an individual's ability to  
 15 work. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (citing  
 16 Social Security Ruling 85-28). The step two inquiry is a *de minimis*  
 17 screening device to dispose of groundless or frivolous claims.  
 18 *Bowen v. Yuckert*, 482 U.S. 137, 153-154.

19 In finding Plaintiff did not have a severe physical impairment,  
 20 the ALJ relied on the treatment records of James Pittman, Ph.D.,  
 21 ARNP, who treated Plaintiff from 1999-2005,<sup>2</sup> as well as medical  
 22 records from examining physician Robert Rose, M.D., and agency  
 23 reviewing physicians. (Tr. 23-24, 26.) He also based his step two

---

24       <sup>2</sup> Plaintiff submitted medical records after the ALJ hearing  
 25 that were reviewed by the Appeals Council. (Tr. 5, 7.) Those  
 26 records are part of the record on review by the court. *Ramirez v.*  
 27 *Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993); *Gomez v. Chater*, 74 F.3d  
 28 967, 971 (9th Cir. 1996).

1 findings on Plaintiff's own statements and testimony and determined  
2 that Plaintiff's assertions of disability were inconsistent with  
3 other evidence in the record and, thus, not credible. (Tr. 27-28.)  
4 Plaintiff objects that the credibility findings and the severity  
5 findings are not supported by substantial evidence, and the ALJ's  
6 failure to include all of his limitations in the RFC was legal  
7 error. (Ct. Rec. 12 at 15.)

8 A. Credibility

9 At step two, Plaintiff must prove the existence of a physical  
10 impairment by providing medical evidence consisting of signs,  
11 symptoms, and laboratory findings; the claimant's own statement of  
12 symptoms alone will not suffice. 20 C.F.R. §§ 404.1508, 416.908.  
13 In *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir. 2002), the  
14 court noted when an ALJ finds the claimant's testimony as to the  
15 severity of impairments is unreliable, the ALJ must make a  
16 credibility determination with findings sufficiently specific to  
17 permit the court to conclude the ALJ did not arbitrarily discredit  
18 claimant's testimony. The ALJ may consider the following factors  
19 when weighing the claimant's credibility: "[claimant's] reputation  
20 for truthfulness, inconsistencies either in [claimant's] testimony  
21 or between [his/her] testimony and [his/her] conduct, [claimant's]  
22 daily activities, [his/her] work record, and testimony from  
23 physicians and third parties concerning the nature, severity, and  
24 effect of the symptoms of which [claimant] complains." See also  
25 *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). If  
26 there is no affirmative evidence that the claimant is malingering,  
27 the ALJ must provide "clear and convincing" reasons for rejecting  
28 the claimant's testimony. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup>

1 Cir. 1998). If the ALJ's credibility finding is supported by  
2 substantial evidence in the record, the court may not engage in  
3 second-guessing. *See Morgan*, 169 F.3d at 600.

4 Here, the ALJ gave clear and convincing reasons for discounting  
5 Plaintiff's testimony. He found that Plaintiff sought treatment for  
6 his transgender issues on a situational basis, but failed to follow  
7 through with treatment or medication recommendations. He also  
8 reasoned that Plaintiff was able to work as a projectionist "without  
9 apparent difficulty," take care of his finances and assist his  
10 disabled roommate. The ALJ noted intermittent and ongoing substance  
11 abuse involving illegal street drugs, inconsistencies between his  
12 statements and the medical reports, evidence of secondary gain and  
13 indications of exaggeration in objective testing as a basis for  
14 finding Plaintiff not fully credible. (Tr. 28.) These findings are  
15 supported by the record.

16 In December 2000, Minerva Arrienda, M.D., noted Plaintiff's  
17 failure to comply with medication and treatment recommendations.  
18 (Tr. 157.) Plaintiff also failed to follow through with his  
19 transgender issues or chemical dependency treatment and after-care,  
20 and still was having challenges with substance abuse in mid-2003,  
21 although he denied drug use at the 2004 hearing. (Tr. 299, 305,  
22 531.) Dr. Pittman continued to recommend chemical dependency  
23 treatment in his September 2005 (post-hearing) notes, indicating  
24 Plaintiff had not complied with prior recommendations. (Tr. 496.)  
25 Examining physician Robert Rose, M.D., noted no difference in  
26 Plaintiff's leg lengths, contradicting Plaintiff's allegations of  
27 back problems and limitations due to unequal leg lengths. (Tr. 204,  
28 527.) In Plaintiff's first interview with examining psychologist

1 James Bailey, Ph.D., Plaintiff reported he quit community college  
2 because of drug use, but at his second interview he stated he left  
3 due to health problems and gender discrimination. Dr. Bailey noted  
4 this inconsistency and evidence of secondary gain in his 2004  
5 report. (Tr. 356-57; see also Tr. 534.) Significantly, Plaintiff  
6 did not report quitting his projectionist job for any disability-  
7 related reason. (Tr. 357.) However, at the hearing, he testified  
8 the reason he could not work was due to depression, anxiety, anger  
9 and his dislike of being around the public. (Tr. 523.) The ALJ's  
10 credibility findings are further supported by objective testing  
11 results in 2000 and 2005 indicating exaggerated responses, "faking  
12 bad," and invalid test results. (Tr. 155, 447.) Contrary to his  
13 testimony that he did not vacuum or sweep, had no family contract,  
14 did not socialize and could walk only a block (Tr. 524-26), the  
15 record indicates Plaintiff was living independently, cooking,  
16 shopping, driving, doing household chores, yard work and odd jobs.  
17 (Tr. 95-97, 100, 107, 357.) His testimony further is contradicted  
18 by post-hearing medical notes indicating that he was doing well and  
19 planning to go to work. (Tr. 448, 453, 490.) The ALJ's credibility  
20 findings are supported by substantial evidence.

## 21 || B. Medical Evidence

22 Plaintiff argues the ALJ erred when he ignored the opinions of  
23 reviewing and consulting physicians as well as the opinions of James  
24 Pittman, Ph.D., ARNP,<sup>3</sup> at step two and in assessing Plaintiff's RFC.

1 (Ct. Rec. 12 at 15.)

2 In a disability proceeding, a treating psychologist or  
3 physician's opinion is given special weight because of his or her  
4 familiarity with the claimant and his physical condition. See *Fair*  
5 *v. Bowen*, 885 F.2d 597, 604-05 (9th Cir. 1989). If the treating  
6 physician's opinions are not contradicted, they can be rejected only  
7 with clear and convincing reasons. *Lester v. Chater*, 81 F.3d 821,  
8 830 (9th Cir. 1996). Opinions of treating or examining doctors, if  
9 contradicted by another doctor, can only be rejected for specific  
10 and legitimate reasons that are supported by substantial evidence in  
11 the record. *Id.*, citing *Andrews*, 53 F.3d at 1043. To meet this  
12 burden, the ALJ can set out a detailed and thorough summary of the  
13 facts and conflicting clinical evidence, state his interpretation of  
14 the evidence, and make findings. *Thomas*, 278 F.3d at 957, citing  
15 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). The ALJ is  
16 not required to accept the opinion of a treating or examining doctor  
17 if that opinion is brief, conclusory and inadequately supported by

---

18 "other source" and not an "acceptable medical source." 20 C.F.R. §§  
19 404.1513(d), 416.913(d). "Other source" testimony can never  
20 establish a diagnosis or disability absent corroborating competent  
21 medical evidence. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9<sup>th</sup> Cir.  
22 1996). However, the ALJ is required to "consider observations by  
23 other sources as to how an impairment affects a claimant's ability  
24 to work." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987).  
25 Although "other source" opinions are not given as much weight as  
26 those of "acceptable medical sources," an ALJ is obligated to give  
27 reasons germane to "other source" testimony before discounting it.  
28 *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993).

1 clinical findings. *Thomas*, 278 F.3d at 957, citing *Matney v.*  
2 *Sullivan*, 981 F.2d 1016, 1019 (9<sup>th</sup> Cir. 1992). Historically, the  
3 courts have recognized conflicting medical evidence, the absence of  
4 regular medical treatment during the alleged period of disability,  
5 and the lack of medical support for doctors' reports based  
6 substantially on a claimant's subjective complaints of pain, as  
7 specific, legitimate reasons for disregarding the treating  
8 physician's opinion. See *Flaten v. Sec. of Health and Human*  
9 *Services*, 44 F.3d 1453, 1463-64 (9<sup>th</sup> Cir. 1995); *Fair*, 885 F.2d at  
10 604.

11 Plaintiff contends the ALJ should have found Plaintiff's feet  
12 abnormalities, back pain, carpal tunnel syndrome and reactive airway  
13 disease/asthma were physical severe impairments. Under the  
14 Regulations, an impairment must result from "anatomical,  
15 physiological, or psychological abnormalities which are demonstrable  
16 by medically acceptable clinical and laboratory diagnostic  
17 techniques." 42 U.S.C. § 423(d)(3). Here, after giving a thorough  
18 summary of the medical evidence, the ALJ found no severe physical  
19 impairments, stating there was no evidence of ongoing treatment,  
20 nerve conduction study or corrective surgery discussion, no  
21 diagnostic work up for the carpal tunnel or hepatitis. (Tr. 27.)  
22 He also found Plaintiff did not follow through with recommended  
23 testing or medications for his ailments and the *pes planus* could be  
24 treated with orthotics. (Id.) Further, none of Plaintiff's  
25 providers opined Plaintiff's physical ailments precluded work.

26 Plaintiff reported to examining physician, Dr. Rose, that he  
27 could stand up to four hours, walk two miles, and sit with no  
28 problems. (Tr. 203.) In July 2002, Dr. Rose diagnosed *pes planus*

1 and opined Plaintiff's foot problems probably could be managed  
2 orthotically. (Tr. 205.) He also diagnosed carpal tunnel syndrome  
3 based on examination, without nerve conduction studies, but did not  
4 indicate the condition caused any limitations. (Tr. 204.) In  
5 November 2002, Dr. Pittman opined Plaintiff could sit for two-thirds  
6 of the day, stand for one-third, move for two-thirds of the day, and  
7 had no problems with handling, hearing, speaking seeing or travel.<sup>4</sup>  
8 (Tr. 242.) In 2003, agency physician Morris Fuller, M.D., upon  
9 reviewing Dr. Rose's report, opined Plaintiff could do medium work  
10 and should avoid concentrated fumes due to asthma. He noted  
11 Plaintiff's complaints were partially credible. (Tr. 255, 257.)

12 In his argument, Plaintiff does not point to any objective  
13 evidence to support his claim that his *pes planus*, asthma or carpal  
14 tunnel condition, or his physical conditions combined, prevented him  
15 from working. See 20 C.F.R. § 404.1513, 416.913 (evidence from  
16 medically acceptable clinical and laboratory techniques is required  
17 to establish impairment; claimant's statements about his symptoms  
18 are not sufficient proof). Although he argues that his job as a  
19 projectionist requires fingering that is impaired by his carpal  
20 tunnel condition, the record indicates he left this job for non-  
21 physical reasons. (Tr. 356.) Also, no medical source indicated  
22 limitations in manipulation. (See Tr. 254.) Plaintiff did not meet  
23 his burden at step two. The ALJ properly found that there was no

---

24 <sup>4</sup> In 2005, after the hearing, Dr. Pittman opined Plaintiff's  
25 mental and physical problems caused mild to moderate impairment in  
26 Plaintiff's ability to perform work-related activities. He  
27 recommended sedentary level work, but noted no limitation on  
28 agility, mobility or flexibility. (Tr. 495-96.)

1 evidence that Plaintiff's physical ailments limited his ability to  
2 perform work activities. (Tr. 27.)

3 Plaintiff's later argument that the ALJ improperly assessed his  
4 RFC is without merit. The RFC is the most a claimant can do  
5 considering his limitations. It is solely the ALJ's responsibility  
6 to determine the RFC, taking into consideration the entire record.  
7 20 C.F.R. §§ 404.1546, 4156.946, SSR 96-5p. Further, the ALJ is not  
8 required to accept as true limitations presented by Plaintiff's  
9 counsel. *Magallanes*, 881 F.2d at 756 (citing *Martinez v. Heckler*,  
10 807 F.2d 771, 773 (9th Cir. 1986)). He may accept or reject  
11 restrictions, as long as they are supported by substantial evidence.  
12 *Magallanes*, 881 F.2d at 756-57.

13 The individual presented in the ALJ's hypothetical to the  
14 vocational expert at step four was one of Plaintiff's age, education  
15 and work experience with no exertional limitations, only superficial  
16 contact with the public and superficial interaction with co-  
17 employees. (Tr. 549.) As discussed above, the ALJ did not err in  
18 finding no severe physical limitations. The ALJ properly found  
19 Plaintiff's self-reporting was not fully credible, and many of the  
20 psychological evaluation forms were based primarily on Plaintiff's  
21 statements. Further, the non-exertional limitations propounded by  
22 Plaintiff's counsel were taken in part from a RFC form completed by  
23 a non-examining psychologist and forms attached to Dr. Bailey's  
24 report. (Tr. 287-89, 360-63, 550-52.) These checklist forms are  
25 not sufficient basis for RFC findings. *Crane v. Shalala*, 76 F.3d  
26 251, 253 (9th Cir. 1996) (citing *Murray v. Heckler*, 722 F.2d 499,  
27 501 (9<sup>th</sup> Cir. 1983)). A review of the entire report shows that Dr.  
28 Bailey observed inconsistencies and evasiveness in Plaintiff's

1 reporting, as well as evidence of secondary gain. (Tr. 356-57.)  
2 Also, objective psychological testing results were found invalid due  
3 to Plaintiff's over-reporting and exaggeration. (Tr. 155, 447-48.)  
4 As discussed above, the ALJ noted this evidence in his credibility  
5 analysis; thus he did not err in discounting Dr. Bailey's checklist  
6 summary.

7 Medical expert Thomas McKnight<sup>5</sup> and treating psychiatrist  
8 Dennis Twigg, M.D., opined Plaintiff had only mild to moderate  
9 limitations. (Tr. 375, 393, 413, 511-12, 514-15.) Contrary to  
10 Plaintiff's assertion that the effects of medication were not  
11 considered, Dr. McKnight testified that larger doses might have  
12 affected Plaintiff's attention, and observed that treating  
13 psychiatrist Dr. Twigg noted no serious problems with either fatigue  
14 or side effects. Dr. McKnight also opined that if Plaintiff were on  
15 street drugs at any time during his mental health treatment, there  
16 would be no way to measure the severity of his symptoms. (Tr. 516.)

---

17       <sup>5</sup> Courts have upheld an ALJ's decision to reject the opinion of  
18 an examining physician based in part on the testimony of a non-  
19 examining medical advisor. *Lester*, 81 F.3d at 831. The analysis  
20 and opinion of an expert selected by an ALJ may be helpful in his  
21 adjudication, and the court should not second guess the ALJ's  
22 resolution of conflicting medical testimony. *Andrews*, 53 F.3d at  
23 1041, citing *Magallanes*, 881 F.2d at 753. Further, testimony of a  
24 medical expert may serve as substantial evidence when supported by  
25 other evidence in the record. *Id.* If supported by substantial  
26 evidence, the ALJ's decision must be upheld, even where the evidence  
27 is susceptible to more than one rational interpretation. *Andrews*,  
28 53 F.3d at 1039-40.

1 Drug use was reported intermittently throughout Plaintiff's medical  
2 record. (Tr. 131, 233, 244, 299, 301, 333, 356, 446.) At the March  
3 2004 hearing, Plaintiff testified he had not used illegal drugs for  
4 about a year. (Tr. 531.) In September 2005, Plaintiff reported to  
5 Dr. Pittman that he had not used methamphetamine for six months or  
6 marijuana for three months. (Tr. 502.)

7 When there are ambiguities and/or conflicts in the medical  
8 record, they must be resolved by the ALJ, and the reviewing court  
9 may not substitute its judgment for that of the ALJ. *Thomas*, 278  
10 F.3d at 956-57. Here, the ALJ properly relied on the treating  
11 psychiatrist's notes and Dr. McKnight's testimony which is supported  
12 by other medical evidence in the record. In light of the entire  
13 record and the ALJ's credibility findings, the hypothetical  
14 presented to the vocational expert is supported by substantial  
15 evidence. Thus, Mr. Moreland's opinion that Plaintiff could still  
16 perform light to medium work as a projectionist and a cleaner is  
17 competent evidence on which to base a finding of non-disability.

18 **CONCLUSION**

19 For the reasons outlined above, the Commissioner's decision to  
20 deny Plaintiff's claim for disability benefits was supported by  
21 substantial evidence in the record and was based upon the proper  
22 legal standards. Accordingly,

23 **IT IS ORDERED:**

24 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 11**) is  
25 **DENIED**.

26 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 13**) is  
27 **GRANTED**.

28 3. The District Court Executive is directed to file this

1 Order and provide a copy to counsel for Plaintiff and Defendant.

2 4. Judgment shall be entered for Defendant and the file

3 **CLOSED.**

4 DATED July 31, 2006.

5  
6 

---

S/ CYNTHIA IMBROGNO  
7 UNITED STATES MAGISTRATE JUDGE  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28